

Handwritten signature or initials in the top right corner.

Nº. 35539-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

RICHELLE A. FAULKNER,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 98-1-01385-9
The Honorable Theodore Spearman, Presiding Judge

Eric Fong
WSBA No. 26030
Attorney for Respondent
569 Division, Ste. A
Port Orchard, WA 98366
(360) 876-8205

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	
1. Is it effective assistance of counsel for trial counsel to fail to object to the introduction of testimony and evidence that marijuana was found at the scene of the alleged crime where the defendant is not charged with any crime relating to marijuana and the presence of marijuana is irrelevant to any other potential issue?	1
2. Did the trial court properly refuse to give Ms. Faulkner’s proposed jury instruction where the instruction was a correct statement of law, was central to Ms. Faulkner’s theory of defense, and the giving of the instruction was supported by the facts introduced at trial?	1
3. Does the doctrine of invited error bar Ms. Faulkner from assigning error to the trial court’s failure to give her proposed instruction?	1
4. Did cumulative error deprive Ms. Faulkner of her right to a fair trial?	1
C. STATEMENT OF THE CASE	1
D. ARGUMENT	
1. It was ineffective assistance of counsel for Ms. Faulkner’s trial counsel to fail to object to the introduction of testimony and evidence that marijuana was found at the scene of the alleged crime where she was not charged with any	

	crime relating to marijuana, the presence of marijuana was irrelevant to any other potential issue, and such evidence was highly prejudicial.....	3
a.	<i>Evidence relating to the marijuana was irrelevant.</i>	4
b.	<i>Evidence relating to the marijuana was highly prejudicial.</i>	5
c.	<i>It was not objectively reasonable for Ms. Faulkner's trial counsel to fail to object to the introduction of evidence regarding the marijuana.</i>	6
2.	The trial court erred in refusing to give Ms. Faulkner's proposed jury instruction.	6
3.	The doctrine of invited error does not apply to this case.	9
4.	Cumulative error deprived Ms. Faulkner of her right to a fair trial.	9
D.	CONCLUSION	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

<i>In re Pers. Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).....	12
<i>In re Pers. Restraint of Tortorelli</i> , 149 Wn.2d 82, 66 P.3d 606, cert. denied, 540 U.S. 875, 124 S.Ct. 223, 157 L.Ed.2d 137 (2003).....	12
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	8
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995)	8
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980).....	5
<i>State v. Hodges</i> , 118 Wn.App. 668, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004)	12
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991)	8
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	8
<i>State v. Jones</i> , 101 Wn.2d 113, 677 P.2d 131 P.2d 131 (1984), overruled on other grounds in <i>State v. Brown</i> , 111 Wn.2d 124, 157, 761 P.2d 588 (1988).....	6
<i>State v. Picard</i> , 90 Wn.App. 890, 954 P.2d 336, review denied, 136 Wn.2d 1021, 969 P.2d 106 (1998).....	8
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2005).	4, 5
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	8

State v. Stevens, 58 Wn.App. 478, 794 P.2d 38, *review denied*,
115 Wn.2d 1025, 802 P.2d 128 (1990).....13

State v. Summers, 107 Wn.App. 373, 28 P.3d 780 (2001)..... 9-10

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004)11

State v. Werry, 6 Wn.App. 540, 494 P.2d 1002 (1972)9

Other Authorities

ER 4015

ER 4025

ER 4035

ER 4046

ER 6096

RCW 69.50.4016

A. ASSIGNMENTS OF ERROR

1. Ms. Faulkner received ineffective assistance of counsel.
2. The trial court erred in declining to give Ms. Faulkner's proposed jury instruction.
3. Cumulative error deprived Ms. Faulkner of her right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is it effective assistance of counsel for trial counsel to fail to object to the introduction of testimony and evidence that marijuana was found at the scene of the alleged crime where the defendant is not charged with any crime relating to marijuana and the presence of marijuana is irrelevant to any other potential issue? (Assignment of Error No. 1)
2. Did the trial court properly refuse to give Ms. Faulkner's proposed jury instruction where the instruction was a correct statement of law, was central to Ms. Faulkner's theory of defense, and the giving of the instruction was supported by the facts introduced at trial? (Assignment of Error No. 2)
3. Does the doctrine of invited error bar Ms. Faulkner from assigning error to the trial court's failure to give her proposed instruction? (Assignment of Error No. 2)
4. Did cumulative error deprive Ms. Faulkner of her right to a fair trial? (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On October 26, 1998, Port Orchard police officer Jimmie Foster was traveling on Highway 16 when he observed a van which was

speeding, crossing over the road edge line or fog line, and had a non-functioning right rear taillight. RP 33-36. Officer Foster stopped the van and contacted the occupants. RP 37. Richelle Faulkner was driving the van. RP 37.

Ms. Faulkner produced her driver's license and Officer Foster returned to his vehicle and performed a records check on Ms. Faulkner. RP 37. Officer Foster discovered that Ms. Faulkner had a warrant for her arrest and arrested her. RP 37. Officer Foster also learned that there was a protective order prohibiting the passenger, Mike Laumen, from coming into contact with Ms. Faulkner. RP 37-38. Officer Foster arrested Mr. Laumen for violation of the protective order. RP 37-38. Officer Foster secured both Ms. Faulkner and Mr. Laumen in his patrol vehicle and transported them to the Kitsap County Jail. RP 38-39.

As Officer Foster was preparing to park his vehicle at the jail, he heard a loud thump coming from directly behind him and observed Ms. Faulkner leaning forward. RP 39. Officer Foster removed Ms. Faulkner and Mr. Laumen from the vehicle, secured them to the side, lifted up the rear seat of the vehicle, and observed two bags on the left side of the vehicle near the seat belt bracket. RP 39. The bags would have been located underneath Ms. Faulkner. RP 40.

On October 27, 1998, Ms. Faulkner was charged with possession

of methamphetamine. CP 12. Ms. Faulkner failed to appear at the omnibus hearing scheduled for December 16, 1998, and a bench warrant was issued for her arrest. CP 12. On May 9, 2006, Ms. Faulkner was arrested on the outstanding warrant while appearing in court to quash the bench warrant. RP 12.

On September 28, 2006, the State filed an amended information charging Ms. Faulkner with possession of a controlled substance and bail jumping. CP 4-6.¹ Ms. Faulkner's jury trial on the charge of possession of methamphetamine began on October 31, 2006. RP 33.

Officer Foster testified that he gave Ms. Faulkner her *Miranda* warnings and that Ms. Faulkner initially denied any knowledge of the bags but later admitted that the two items belonged to her. RP 40. Officer Foster testified that Ms. Faulkner admitted that one of the bags contained crank, a street name for methamphetamine and the other bag contained marijuana. RP 40-42. Officer Foster also testified that he field tested the contents of both bags and the contents tested positive for marijuana and crank. RP 42.

Ms. Foster testified that the drugs had been hidden in Mr. Laumen's shoe and that Mr. Laumen had made Ms. Faulkner remove the drugs from his shoe on the way to the police station. RP 107-109. Ms.

Faulkner testified that she had possession of the drugs for less than five seconds. RP 112.

On November 1, 2006, the jury returned a verdict of guilty on the charge of possession of methamphetamine. CP 81.

Notice of appeal was timely filed on November 11, 2006. RP 91.

D. ARGUMENT

1. **It was ineffective assistance of counsel for Ms. Faulkner's trial counsel to fail to object to the introduction of testimony and evidence that marijuana was found at the scene of the alleged crime where she was not charged with any crime relating to marijuana, the presence of marijuana was irrelevant to any other potential issue, and such evidence was highly prejudicial.**

In order to show that he received ineffective assistance of counsel, an appellant must show (1) that trial counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption

¹ The bail jump charge resolved pre-trial on motion of Ms. Faulkner to dismiss for violation of the statute of limitations and is not the subject of this appeal.

where there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, 153 Wn.2d at 130, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

a. *Evidence relating to the marijuana was irrelevant.*

All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, the likelihood that introduction of the evidence would confuse the issues or mislead the jury, or if introduction of the evidence would be a waste of time, cause an undue delay, or be needlessly cumulative. ER 403.

Here, Ms. Faulkner was charged with possession of methamphetamine. CP 4-6.² The elements of unlawful possession of a

² The first amended information filed on September 28, 2006, alleges Ms. Faulkner possessed a controlled substance in violation of RCW 69.50.4013. CP 4-6. RCW 69.50.4013 did not go into effect until July 1, 2004. Ms. Faulkner's Judgment and

controlled substance are (1) possession of a controlled substance (2) without a valid prescription or order authorizing possession. RCW 69.50.401(d). The fact that a baggie containing marijuana was found in the vehicle along with the baggie containing methamphetamine is irrelevant to any issue relating to whether or not Ms. Faulkner possessed the baggie of methamphetamine. Therefore, any evidence regarding the baggie of methamphetamine was irrelevant and inadmissible.

b. Evidence relating to the marijuana was highly prejudicial.

Evidence of extrinsic crimes is inherently prejudicial, especially if the alleged act is similar to the charged offense. *State v. Jones*, 101 Wn.2d 113, 120, 677, 677 P.2d 131 P.2d 131 (1984), *overruled on other grounds in State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988).

“Evidence of other crimes, wrongs, or acts...may...be admissible for...purposes [] such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

Under ER 609, evidence of prior criminal activity may be admissible to attack the credibility of a witness, provided certain requirements are met.

Sentence indicates she was convicted of violating RCW 69.50.401. CP 82-90. RCW 69.50.4013 is a recodification of RCW 69.50.401(d), the applicable statute in effect at the time this crime occurred. It appears that the amended information erroneously listed the wrong statute.

Here, the evidence relating to the presence of the baggie of marijuana was not offered pursuant to ER 404(b) or ER 609. As discussed above, the evidence relating to the marijuana was not relevant to the crime Ms. Faulkner was charged with, yet was evidence of a crime virtually identical to the crime she was charged with. As such, the evidence relating to the baggie of marijuana was highly prejudicial in that the jury would be presented with evidence that Ms. Faulkner possessed not one, but two different controlled substances and would draw the improper propensity inference that the presence of two different controlled substances made it more likely that Ms. Faulkner possessed the methamphetamine.

c. It was not objectively reasonable for Ms. Faulkner's trial counsel to fail to object to the introduction of evidence regarding the marijuana.

Given that the evidence relating to the marijuana was irrelevant and highly prejudicial, it was not objectively reasonable nor can it be considered legitimate trial strategy for Ms. Faulkner's trial counsel to fail to object to the introduction of such evidence. Failing to object to such evidence was ineffective assistance of counsel which resulted in Ms. Faulkner being prejudiced by the introduction of irrelevant and highly prejudicial evidence.

2. The trial court erred in refusing to give Ms. Faulkner's proposed jury instruction.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). "Failure to give such instructions is prejudicial error." *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999). However, a defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. *State v. Hoffman*, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991).

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. *State v. Picard*, 90 Wn.App. 890, 902, 954 P.2d 336, 136 Wn.2d 1021, 969 P.2d 106 (1998). A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

It is reversible error for the trial court to refuse to give a proposed instruction if the instruction states the proper law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Ms. Faulkner's defense at trial was that the State had insufficient evidence to convict her of possession of a controlled substance since her possession of the drugs was only passing. RP 130. In support of this

theory of defense, Ms. Faulkner proposed a jury instruction defining possession which was based on WPIC 50.03 but which contained the extra sentence, “Proximity alone, passing control, or momentarily handling the substance is insufficient to establish constructive possession.” RP 126-127, CP 56.

In support of the modification to the WPIC, Ms. Faulkner cited *State v. Werry*, 6 Wn.App. 540, 494 P.2d 1002 (1972). RP 127-130. The *Werry* court held that, “It is not enough that the defendants or either of them might have been in close proximity to the drugs or that either of them might have earlier momentarily handled them with a brief and passing control” was a proper summary of the law. *Werry*, 6 Wn.App. at 547, 494 P.2d 1002.

Relying on *State v. Summers*, 107 Wn.App. 373, 28 P.3d 780 (2001), the trial court ruled that it would be improper to include the additional sentence in the jury instruction. RP 133-138. In declining to give Ms. Faulkner’s proposed jury instruction, the court cited the following language from *Summers*,

Based upon the analysis of *Callahan* in *Staley*, *Bowman*, and *Werry*, the following rules apply in possession cases. Possession is more than passing control. Momentary handling, without more, is insufficient to prove possession. But evidence of momentary handling, when combined with other evidence, such as dominion and control of the premises, or a motive to hide the item from police, is

sufficient to prove possession. Finally, even passing control of contraband is not legal; it is merely insufficient to prove possession.

RP 133-134, citing *Summers*, 107 Wn.App. at 386-387.

The trial court declined to give Ms. Faulkner's proposed instruction on grounds that Ms. Faulkner's admission provided "other evidence" as contemplated by *Summers*, and therefore it was improper to give Ms. Faulkner's proposed instruction. RP 137.

The trial court's concern was not that that the jury instruction proposed by Ms. Faulkner was an incorrect statement of the law; rather, the trial court's concern was that the jury instruction correctly stated that passing control and proximity were not enough to establish constructive possession but failed to include the law as stated in *Summers* that passing control and proximity combined with "other evidence" such as a motive *is* sufficient to prove constructive possession. However, rather than supplement the WPIC further with language tracking *Summers*, the trial court instead struck the sentence completely. This was an abuse of discretion.

Given that Ms. Faulkner had a right to have the jury fully instructed on her theory of the case, and given that failure to so instruct the jury is harmful error, the proper course of action for the trial court to have taken would have been to give Ms. Faulkner's proposed jury instruction

and to add language instructing the jury that passing control and proximity combined with “other evidence” such as a motive is sufficient to prove constructive possession.

The trial court abused its discretion in striking the language. The language was an accurate statement of law and the giving of the language in an instruction was supported by the facts of the case, therefore, no tenable grounds existed to support not giving the jury Ms. Faulkner’s proposed instruction.

Ms. Faulkner’s proposed instruction accurately stated the law and the facts of the case supported giving it. The trial court’s concerns about the jury instruction could have been addressed and Ms. Faulkner’s right to have the jury instructed on her theory of the case could have been protected by the trial court supplementing the jury instruction on the definition of possession rather than editing it. The trial court’s decision to not fully instruct the jury on the definition of possession was prejudicial error which requires reversal of her conviction and remand for a new trial.

3. The doctrine of invited error does not apply to this case.

It is anticipated that the State will attempt to argue that the doctrine of invited error bars Ms. Faulkner from assigning error to the trial court’s failure to give her proposed instruction. Any such argument will fail.

The State bears the burden of proof on invited error. *State v.*

Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Under the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. denied*, 540 U.S. 875, 124 S.Ct. 223, 157 L.Ed.2d 137 (2003).

Here, Ms. Faulkner objected to the trial court giving the instruction which ultimately became jury instruction number 7 (CP 58-72) on grounds that it did not give a complete summary of the law as applicable to Ms. Faulkner's case. RP 126. Thus, Ms. Faulkner cannot be said to have "set up" the error she is complaining of on appeal and the doctrine of invited error does not apply.

4. Cumulative error deprived Ms. Faulkner of her right to a fair trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d

960 (2004). Rather, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn.App. at 673-674, 77 P.3d 375.

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

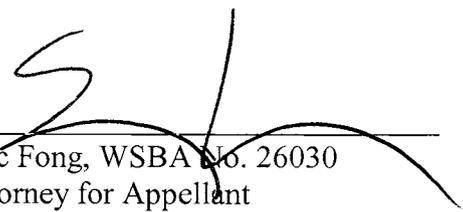
As discussed above, Ms. Faulkner received ineffective assistance of counsel and was prejudiced when the trial court declined to give her proposed jury instruction. Also as discussed above, Ms. Faulkner was prejudiced by both of these errors. Should this court find that neither of these errors alone warrants reversal, this court should find that these errors taken together effectively denied Ms. Faulkner a fair trial.

E. CONCLUSION

For the reasons state above, this court should vacate Ms. Faulkner's conviction and remand the case for a new trial.

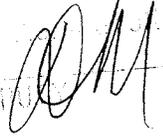
DATED this 16 day of April, 2007.

Respectfully submitted,


Eric Fong, WSBA No. 26030
Attorney for Appellant

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF WASHINGTON
21 APR 19 11:53
STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	Appeal No. 35539-6-II
Respondent,)	Superior Court No. 98-1-01385-9
)	
vs.)	
)	DECLARATION OF MAILING
RICHELLE A. FAULKNER,)	
)	
Appellant.)	
_____)	

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

containing the original and one copy of the Brief of Appellant.

Mr. Randall Sutton	Ms. Richelle Faulkner-Lauman
Attorney at Law	2836 Alder Street
614 Division Street, MS-35	Bremerton, WA 98310
Port Orchard, WA 98366	

containing a true copy of the Brief of Appellant

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 16th day of April 2007, at Port Orchard, Washington.


ANN BLANKENSHIP

ROVANG FONG & ASSOCIATES
569 DIVISION, SUITE A
PORT ORCHARD, WA 98366
TEL (360) 876-8205
FAX (360) 876-4745